Supreme Court, U.S.
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No. 96-1511

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARGARET L. O'DELL, PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress's preclusion of judicial review of administrative decisions allowing or denying benefits under the Federal Employees' Compensation Act violates the Due Process Clause.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 8-9) is unpublished, but the decision is noted at 106 F.3d 386 (Table). The opinion of the district court (Pet. App. 1-8) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 23, 1996. The petition for a writ of certiorari was filed on March 24, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner formerly worked at the Veterans' Administration Medical Center in Lebanon, Pennsylvania. Pet. App. 1. Petitioner alleges that she was exposed to toxic fumes during her work, and that the exposure resulted in lung disease. Pet. 2-3; Pet. App. 1, 4. In October 1988, petitioner filed a claim for benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, which establishes a comprehensive workers' compensation scheme for federal employees who die or become disabled as a result of personal injuries sustained while in the performance of their duties. 5 U.S.C. 8102(a).

The Office of Workers' Compensation Programs (OWCP) in the Department of Labor, which administers FECA for the Secretary of Labor, 20 C.F.R. 10.2(a), granted petitioner certain medical benefits, but it denied her claim for disability benefits on a number of occasions. See Pet. App. 3-4; App., *infra*, 4a-6a.[1] The Department's Employees' Compensation Appeals Board (ECAB), which makes final decisions on appeals from OWCP's determinations, 5 U.S.C. 8149, affirmed the denials. See Pet. App. 4-5. On March 1, 1996, OWCP initially granted a request for reconsideration and awarded petitioner compensation for up to two days of missed work; but on March 29, 1996, the Director of OWCP, on his own motion, reversed that decision and again denied petitioner's disability benefits claim in full.

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[1] The various administrative decisions are not reproduced in the appendix to the petition. We have reprinted as an appendix to this brief (App., *infra*, 1a-6a) the March 29, 1996 decision denying disability benefits.

Petitioner sought review of that decision in the United States District Court for the Middle District of Pennsylvania. The district court dismissed the action. Pet. App. 1-8. The court pointed out that 5 U.S.C. 8128(b) provides that:

> The action of the Secretary or his designee in allowing or denying a payment under this subchapter is—
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Relying on controlling appellate precedent, the district court rejected petitioner's argument that Section 8128(b)'s preclusion of judicial review "violates her constitutional rights that are protected by the Fifth and Fourteenth Amendments." Pet. App. 6.

The court of appeals affirmed without opinion. Pet. App. 8-9.

ARGUMENT

The United States, as sovereign, is immune from suit except to the extent that it consents to be sued. *E.g.*, *Hercules Inc.* v. *United States*, 116 S. Ct. 981, 985 (1996); *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). In the case of federal employees who are injured on the job, Congress has not consented to suit. In the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, however, Congress has provided such employees with "the right to receive immediate, fixed benefits, regardless of fault and without need for litigation," under a comprehensive workers' compen-

sation scheme. *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983).

Congress committed the administration of that scheme to the Secretary of Labor. See generally 5 U.S.C. 8120-8128, 8145, 8149. FECA benefits are an employee's exclusive remedy against the United States. See 5 U.S.C. 8116(c). And in 5 U.S.C. 8128(b), Congress provided that decisions reached by the Secretary under FECA are to be respected as "final and conclusive for all purposes and with respect to all questions of law and fact," and are "not subject to review by another official of the United States or by a court by mandamus or otherwise."

There is nothing constitutionally suspect about Congress's refusal to provide for judicial review under FECA. "[T]he United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts"; rather, "where a statute creates a right and provides a special remedy, that remedy is exclusive." *United States* v. *Babcock*, 250 U.S. 328, 331 (1919) (upholding preclusion of judicial review of administrative decisions refusing compensation for property allegedly lost in government service); see also *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 90 (1991) (in light of Section 8128(b), "the courts have no jurisdiction over [Federal Tort Claims Act] claims where the Secretary [of Labor] determines that FECA applies"); *United States* v. *Fausto*, 484 U.S. 439, 455 (1988) (civil service disciplinary actions); *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974) (discussing review-preclusion provision formerly applicable to decisions concerning veterans' benefits); *Dismuke* v. *United States*, 297 U.S. 167, 171-172 (1936) ("The United States is not, by the creation of claims against itself, bound to provide

a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise.")

This Court has recognized a general "presumption favoring judicial review of administrative action." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). That presumption, however, "may be overcome by specific language or [other] specific * * * indicator[s] of congressional intent." *Ibid.*; see also, *e.g.*, *Fausto*, 484 U.S. at 452. On two occasions, the Court has specifically cited Section 8128(b) as containing the sort of "unambiguous and comprehensive" language that Congress uses "when [it] intends to bar judicial review altogether." *Lindahl* v. *OPM*, 470 U.S. 768, 779-780 & n.13 (1985); see *Southwest Marine*, 502 U.S. at 90 (quoting *Lindahl*).

Several courts of appeals have also held that Section 8128(b) does not bar substantial "constitutional" challenges to OWCP's administration of FECA, as opposed to claims "seeking * * * benefits on the basis of an error of fact or law by" OWCP. *Czerkies* v. *United States Dep't of Labor*, 73 F.3d 1435, 1441 (7th Cir. 1996) (en banc); see *id.* at 1438 and cases there cited. Even if that proposition is true (but see *id.* at 1443-1448 (Easterbrook, J., concurring in the judgment)), it does not help petitioner in this case. Petitioner has had a full opportunity to present evidence and have her claims considered, leading to two written opinions from the Department of Labor's Employees' Compensation Appeals Board, followed by further consideration and action on her request for reconsideration by the Director of OWCP, acting on behalf of the Secretary of Labor. See App., *infra*, 3a-5a. Under these circumstances, petitioner cannot plausibly argue that she has been denied due process.

Nor is there substance to petitioner's suggestion (Pet. 13) that she has been denied the equal protection of the laws because private-sector employees covered by other workers' compensation systems might have access to the courts. Injured federal employees are not situated similarly to private employees for these purposes, because the United States' sovereign immunity protects it from any claim to which it has not consented. See *Lane* v. *Pena*, 116 S. Ct. 2092, 2098 (1996) ("sovereign immunity places the Federal Government on an entirely different footing than private parties" for purposes of the Rehabilitation Act of 1973); *Dahn* v. *Davis*, 258 U.S. 421, 431 (1922) (in the absence of FECA, federal employees "would be without remedy when injured by fault of the Government").[2]

Petitioner's arguments amount to nothing more than a "garden-variety claim for benefits," albeit partially "cloaked in constitutional terms." *Czerkies*, 73 F.3d at 1443; see also *id.* at 1439; compare Pet. 12. Judicial review of such a claim is precluded by Section 8128(b), and there is nothing unconstitutional about Congress's decision to preclude it. See *Benton* v. *United States*, 960 F.2d 19, 22 (5th Cir. 1992); *Paluca*

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[2] Petitioner asserts (Pet. 5-6) that "[t]he OWCP and ECAB were violating the provisions of the statute and their own policies and procedures." Even if that claim were judicially cognizable in light of Section 8128(b), compare *Hanauer* v. *Reich*, 82 F.3d 1304, 1307 (4th Cir. 1996) (court may review claim that agency violated a clear statutory mandate) with *Board of Governors* v. *MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (clear statutory rule sufficient to limit judicial review as prescribed in statute), it is without merit. Petitioner identifies no specific statutory violation in the consideration of her case, and we are aware of none.

v. *Secretary of Labor*, 813 F.2d 524, 527-528 (1st Cir.), cert. denied, 484 U.S. 943 (1987); *Czerkies*, 73 F.3d at 1443 (Easterbrook, J., concurring in the judgment), and cases there cited. We are aware of no case holding to the contrary, and the matter does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General

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EDWARD D. SIEGER
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MAY 1997

APPENDIX

In the matter of the claim for compensation under the Federal Employees' Compensation Act of:	: VACATE ORDER : REJECTION OF CLAIM
(Claimant) MARGARET O'DELL	: Case No. A3-137453
Employed by: Veterans Administration Lebanon, Pa.	:

Such investigation in respect to the above entitled claim having been made as is considered necessary, and after due consideration of such claim and reports this Office makes the following:

FINDINGS OF THE FACT[S]

That the Memo to the Director dated 3/29/96 be made a part hereof by reference.

Upon the foregoing findings of fact, it is ORDERED that the Reconsideration decision dated 3/1/96 be and is hereby VACATED by the Director on his own motion for the reason that the evidence submitted in support of Ms. O'Dell's 12/5/95 Reconsideration request is insufficient to estabiish work-related

disability and/or the existence of any work-related pulmonary condition.

Given under my hand at
Philadelphia, Pennsylvania
this 29 day of March, 1996.

By Order of the Director

By: /s/ ANN BAZIK
ANN BAZIK
Supervisory Claims
Examiner

MEMO TO THE DIRECTOR

The issue to be determined in this case is whether the Reconsideration decision dated March 1, 1996 should be vacated on the Director's own motion.

Section 8128 of the Federal Employees' Compensation Act (FECA), "REVIEW OF AWARD", states the following:

(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may-

(1) end, decrease, or increase the compensation previously awarded; or

(2) award compensation previously refused or discontinued.

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is-

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Credit shall be allowed in the accounts of a certifying or disbursing official for payment in accordance with that action.

Subject claim involves Margaret O'Dell, DOB 4/13/29, who was employed as a Nurse by the Veterans Administration, Lebanon, Pa. Her contention was that she was exposed to fumes at work because the Engineering Workshop was located directly below her office. Ms. O'Dell claimed exposure from 9/13/87 to 1/31/89; at which time she resigned. Her occupational disease claim was initially denied on 1/11/89. Subsequently, on 4/14/89, the claim was approved for exposure to fumes.

By formal decision dated 8/27/90, Ms. O'Dell's claim for disability and medical benefits was formally denied. Hearings and Review affirmed this decision on 1/4/91. A Reconsideration request was denied on 8/15/91. Another Reconsideration request was denied on 6/5/92. The Employees' Compensation Appeals Board affirmed the negative decision on 6/3/93. On 7/19/93, ECAB dismissed Ms. O'Dell's Reconsideration request. The District Office denied another reconsideration request on 1/3/94. The Employees' Compensation Appeals Board again affirmed the unfavorable decision in Ms. O'Dell's case on 7/3/95.

It should be noted that ECAB stated the following in their 7/3/95 decision: "By letter dated October 14, 1993, appellant stated that she enclosed reports dated September 30 and July 22, 1993 from Dr. Mitchell, as well as the results of pulmonary function tests. The record does not contain copies of these reports."

Ms. O'Dell sought a Reconsideration of the Board's 7/3/95 decision, and her request was denied by ECAB on 8/11/95. They stated the following: "The Director has reviewed appellant's July 26, 1995 petition . . . and notes that it fails to establish that the Board's July 18, 1995 decision contains either an error of fact or law. Instead, appellant is attempting to reargue her case in the guise of a petition for reconsideration. Under these circumstances, the Director submits that the Board should deny the petition."

It should be noted that Ms. O'Dell sent to the Board copies of Dr. Mitchell's 9/30/93 and 7/23/93 reports, as well as the pulmonary function study dated 4/23/93. Thus, while the Board did not have these reports when they rendered their 7/3/95 unfavorable decision, they *did* have the reports in question at the time they made their 8/11/95 unfavorable decision.

Ms. O'Dell again returned to the Board to appeal their 8/11/95 denial of her Reconsideration request. On 9/26/95, ECAB denied this request also.

Subsequently, Ms. O'Dell filed a Reconsideration request with the District Office on 12/5/95. The material submitted in support of her request consisted of Dr. Mitchell's 9/30/93 and 7/23/95 reports, and the pulmonary function study dated 4/25/93.

On March 1, 1996, a Compensation Order was issued, Modification in Part, stating that Ms. O'Dell is en-

titled to compensation for the period of 10/13/88 through 10/17/88, subject to waiting days.

The medical evidence submitted in support of Ms. O'Dell's 12/5/95 Reconsideration request is insufficient to establish that a pulmonary condition exists and/or that work-related disability is established. Dr. Mitchell took over Ms. O'Dell's care when Dr. Schaub left Johns Hopkins in 9/92. He would have no first-hand knowledge of Ms. O'Dell's condition/disability, if any, in 10/88, some 5 years earlier than his 1993 reports. Furthermore, when Ms. O'Dell sought medical treatment with Dr. Glesson, a Pulmonary Specialist at Hershey Medical Center, on 11/10/88, he'd reported: ". . . although beyond any doubt, this woman has had some exposure to some solvent fumes at her job, we are unable to identify a specific exposure which is likely to lead to lung disease. No specific arrangements for a revisit was made."

SUMMARY AND RECOMMENDATION: the Director, on his own motion, has the right to review an award decision, either for or against a claimant, as specified in Section 8128 of the Federal Employees' Compensation Act. In this case, the Reconsideration decision of 3/1/96 has been reviewed and a determination made to VACATE that decision. As stated above, the Board DID have access to Dr. Mitchell's 9/30/93 and 7/23/92 reports, as well as the 4/23/93 pulmonary function test, prior to the rendering of their 8/11/95 unfavorable decision. Additionally, this medical evidence which Ms. O'Dell submitted in support of her 12/5/95 Reconsideration request, is insufficient to establish that a pulmonary condition exists and/or that work-related disability is established.

Ms. O'Dell's only entitlement on this claim is for the payment of medical bills for the accepted condition of "exposure to fumes" from 10/13/88, the "date of injury" established on this occupational disease claim, to 8/27/90 when the claim for compensation and medical bills was denied.

By: /s/ ANN BAZIK
ANN BAZIK
Supervisory Claims
Examiner
3/29/96